Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Verizon Virginia, Inc.,	)	
Verizon Long Distance Virginia, Inc.,	)	WC Docket No. 02-214
Enterprise Solutions Verizon Virginia, Inc.,	)	
Verizon Global Networks, Inc., and	)	
Verizon Select Services of Virginia, Inc., for	)	
Authorization To Provide In-region, InterLATA	)	
Services In Virginia	)	

COMMENTS OF STARPOWER COMMUNICATIONS, LLC AND US LEC CORP.

Deborah Royster
General Counsel
Starpower Communications, LLC
10000 Derekwood Lane
Lanham, MD 20706

Wanda Montano
Vice President, Regulatory Affairs
US LEC Corp.
6801 Morrison Boulevard
Charlotte, North Carolina 28211

Richard M. Rindler
Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7645 (Facsimile)

Counsel for US LEC Corp. and Starpower Communications, LLC

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SUMMARY

Verizon's application for Section 271 authority in Virginia should be denied because Verizon has failed to demonstrate that its markets are irreversibly open to competitors and because Verizon continues to discriminate against CLECs in the provision of unbundled network elements, including loop-transport UNE combinations effectively compelling CLECs to purchase out of special access tariffs.

For the first time in a Bell company section 271 proceeding, the Commission has been presented with a report from the applicable state commission stating that the Bell company's provision of special access circuits "has a significant and adverse effect on competition." The Commission can no longer overlook provisioning of special access circuits in terms of checklist compliance. As long as CLECs are required to obtain special access circuits as essential facilities, a Bell company's provisioning of them must be considered in Section 271 proceedings. The report from the Hearing Examiner of the Virginia State Corporation Commission makes clear that excluding special access services from checklist review will have an adverse effect on competition in Virginia.

Before any favorable action is taken on the Application, the Commission must halt Verizon's attempts to restrict and limit access to dedicated transport by charging access rates in lieu of UNE rates, and by seeking to impose collocation requirements before dedicated transport can be ordered at UNE rates. The Commission must similarly review Verizon's entrance facilities rate structure in order to assess whether Verizon is unjustifiably increasing the cost of dedicated transport by imposing unwarranted charges.

The Commission should require considerably stronger assurances from Verizon concerning compliance with the *Virginia Arbitration Order*, especially with respect to

geographically relevant interconnection points ("GRIPs") and virtual NXX. In light of Verizon's past efforts to impose its one-sided interpretations of the Commission's key regulatory decisions on CLECs, its present assurances of compliance with the *Virginia Arbitration Order* may amount to little more than promises to negotiate again what the Commission has already decided. The Commission should require unconditional compliance with the *Virginia Arbitration Order.*

The steady erosion of the separation between checklist compliance and satisfaction of the public interest standard must also be reversed. Given the state of the competitive telecom industry, and BOC efforts to thwart the local competition provisions of the Telecom Act, granting Verizon Section 271 authority is clearly not in the public interest, and Verizon's Application should be denied.

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COMMENTS OF STARPOWER COMMUNICATIONS LLC AND US LEC CORP.

Starpower Communications, LLC ("Starpower") and US LEC Corp. ("US LEC") submit these comments concerning the Application by Verizon Virginia, Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia, Inc., Verizon Global Networks, Inc., and Verizon Select Services of Virginia, Inc., for Authorization To Provide In-region, InterLATA Services In Virginia ("Application").[1] For the reasons stated in these comments, the Commission should deny the Application.

I. VERIZON HAS FAILED TO ADEQUATELY AFFIRM THAT IT WILL COMPLY WITH THE *VIRGINIA ARBITRATION ORDER*

In the Application, Verizon states that it will amend its interconnection agreements with WorldCom, AT&T, and Cox within 45 days consistent with the *Virginia Arbitration Order*,[2] and

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[1] Comments Requested on the Joint Application by Verizon Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Virginia, Public Notice, WC Docket No. 02-214, DA 02-1893, released Aug. 1, 2002.

[2] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon*

that once those interconnection agreements are signed and approved they will be available for adoption by other CLECs.[3] It further states that pending completion and approval of these agreements, CLECs in Virginia may also request interconnection agreement negotiations for offerings and arrangements that the Commission in the *Virginia Arbitration Order* found were required by law.[4]

The Commission should require substantially greater assurance of compliance with the *Virginia Arbitration Order*. In that the decision, the Commission flatly rejected Verizon's position concerning geographically relevant interconnection points ("GRIPs), virtually geographically relevant interconnection points ("VGRIPs"), and virtual foreign exchange ("FX"). Verizon's attempt over the last few years to impose its views concerning GRIPs and virtual FX have been major stumbling blocks in efforts by CLECs to obtain new interconnection agreements from Verizon for Virginia and other states. Moreover, Verizon continues to push its now unlawful views on GRIPs and virtual FX in states other than Virginia. Verizon's dominant position and CLECs' need for interconnection agreements give CLECs two options: acquiesce or litigate. Both options have an anticompetitive impact in the acquiescence implements the BOC's view and litigation diverts CLEC resources from more productive uses such as building out networks. Accordingly, the Commission should require Verizon to state explicitly that it will drop its GRIPs, VGRIPs, and virtual FX positions in Virginia and region-wide.

Further, Verizon's past practices concerning permitting CLECs to adopt interconnection agreements make its offer to permit other CLECs to adopt the WorldCom, AT&T, and Cox

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Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-218, Memorandum Opinion and Order, DA 02-1731 (Jul. 17, 2002) ("*Virginia Arbitration Order*").

3 Application at 13.

4 *Id.*

interconnection agreements unpersuasive. While Verizon has permitted CLECs to adopt other CLECs' interconnection agreements, it has used the occasion to attempt to impose on CLECs Verizon's view of how the interconnection agreement should be applied or interpreted. For example, Verizon's so-called "Adoption Agreements" typically contain numerous statements of Verizon's position on the terms and conditions being adopted that Verizon expects CLECs to accept. Likewise, Verizon's refusal to adhere to its merger commitment to allow CLECs to port negotiated agreements across state lines indicates Verizon's intent to impede CLECs at every opportunity.[5] Given its previous embrace of GRIPs and virtual FX, Verizon is likely to attempt to require CLEC to agree to unreasonable interpretations of these issues if CLECs attempt to adopt the new agreements of WorldCom, AT&T, and Cox in Virginia. Even if those parties may have the resources and time be able to resist unreasonable interpretations by Verizon in the current negotiations, Verizon may well attempt to impose on other CLECs its views as a condition of adopting the WorldCom, AT&T, or Cox agreements. Accordingly, the Commission should require Verizon to state that it will implement the *Virginia Arbitration Order* unconditionally in all respects, and especially with respect to GRIPs, VGRIPs, and virtual FX, before making any determination that it has complied with that decision.

[5] Letter, DA 00-2890, from Carol Mattey, Deputy Chief, Common Carrier Bureau, to Michael Shor, Counsel for Focal Communications Corporation, dated December 22, 2000.

II. VERIZON FAILS TO PROVIDE NON-DISCRIMINATORY ACCESS TO UNBUNDLED NETWORK ELEMENTS IN VIOLATION OF CHECKLIST ITEM 2, AND NONDISCRIMINATORY ACCESS TO HIGH CAPACITY LOOPS AND TRANSPORT IN VIOLATION OF CHECKLIST ITEMS 4 AND 5

A. Legal Standard

Section 271(c)(2)(B) of the 1996 Act requires a BOC to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251(c)(3) and 252(d)(1). Section 271(c)(2)(B) also requires Verizon to provide CLECs with DS-1 facilities for use as both high-capacity loop and transport facilities under checklist items 4 and 5. In evaluating Verizon's performance for specific loop types such as DS-1 loops, the Commission must consider patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.[6] With respect to unbundled local transport, the Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[7] This Commission has also required that the ILEC must provide all technically feasible capacity related transmission services, including DS-1 transport.[8]

B. Verizon Fails to Provide Non-Discriminatory Access to High-Capacity Facilities, Forcing CLECs to Purchase Such Circuits as Special Access

Verizon continues to fail to provide high-capacity facilities to CLECs on a nondiscriminatory basis. High capacity facilities, such as DS-1 and DS-3 loops, multiplexing,

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6 *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 122 (Apr. 16, 2001) ("*Verizon Massachusetts 271 Order*").

7 *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd 20599 (1998) (*"Second Louisiana Order*") at ¶ 201.

and DS-1 and DS-3 transport, are used by CLECs in order to provide affordable, competitive broadband service options to business customers. The Department of Justice has noted the "unique attributes of high-capacity loops, which are key inputs for CLECs competing for business customers."[9] CLECs have attempted to purchase these facilities as unbundled network elements ("UNEs") pursuant to interconnection agreements. But resistance by Verizon to provisioning of loops, multiplexing, and transport in combination, and interpretations of FCC orders that impose conditions that CLECs cannot meet, as discussed below, have forced CLECs to purchase identical facilities as special access products at prices above total element long-run incremental cost ("TELRIC").

In previous BOC 271 Application proceedings, US LEC asserted that the Bell companies' intransigence in providing high-capacity loops, multiplexing, and transport to US LEC as UNEs, or in converting existing special access circuits to UNEs, violates checklist items 2, 4 and 5, access to unbundled network elements, loops, and transport.[10] Even though the Commission chose not to respond to US LEC's comments with regard to special access services in the *Georgia/Louisiana 271 Order*,[11] Verizon's provision of special access lines to competitors should be an essential component of any review of Verizon's compliance with the 1996 Act.

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[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") at ¶ 308.

[9] *Application by SBC Communications Inc, Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provided In-Region, InterLATA Services in Missouri*, CC Docket No. 01-88, Evaluation of the United States Department of Justice at 7, n. 23 (May 9, 2001).

[10] *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, Comments of US LEC Corp. and XO Georgia, Inc., dated March 4, 2002.

[11] *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, Memorandum Opinion and Order (rel. May 15, 2002) ("*Georgia/Louisiana 271 Order*").

Not only does Verizon's performance in this area continue to be woeful, but the Virginia SCC has acknowledged the poor provisioning of special access circuits and its impact on competition:

> In regards to unbundled local loops, especially concerning unbundled DS-1 Loops, CLECs complained that Verizon Virginia's policy by which it determines the availability of facilities to meet CLEC requests was too restrictive. Verizon Virginia is not required by the Act or the FCC to construct facilities to meet CLEC demands for unbundling. However, CLECs maintained that some activities, which Verizon Virginia classifies as additional construction, are only maintenance. CLECs are thus forced to purchase the same facilities as special access at much higher prices. Because the FCC has approved the same Verizon policy in other recent § 271 applications, Verizon Virginia's policy was found to be checklist compliant in Virginia. Nonetheless, I find Verizon Virginia's policy has a significant and adverse effect on competition in Virginia, is inconsistently applied across UNEs, is at odds with industry accounting rules, and is inconsistent with the pricing of unbundled elements. I recommend that the Commission in its consulting role so advise the FCC.[12]

The Commission is now faced with a specific finding by a state commission that BOC conduct regarding special access services has a significant and adverse effect on competition. The only way to overlook this finding is to cling to the misguided position that provisioning of special access circuits does not constitute provisioning of high-capacity loops or transport.

The Commission cannot maintain that position any longer. The Commission must close this gargantuan loophole in BOC provisioning of wholesale facilities to CLECs and include review of provisioning of special access circuits within checklist compliance. At a minimum, the Commission should promptly establish performance metrics for provision of interstate special access service.

[12] *In the matter of Verizon Virginia Inc., to verify compliance with the conditions set forth in 47 U.S.C. § 271(c)*, Case No. PUC-2002-00046, Report of Alexander F. Skirpan, Jr., Hearing Examiner (Va. SCC July 12, 2002) at 2 ("*Virginia SCC Report*") (emphasis added).

C. Restrictions on the Use of EELs Are Not Supported by the Statute

The only reason that special access circuits are not now included within review of checklist compliance stems from the Commission's *UNE Remand Order* and subsequent *Supplemental Order Clarification.* In those decisions, the Commission ruled that UNEs could not be ordered in combination (as the so-called "enhanced extended link" or "EEL") as a substitute for special access services "[b]ecause of concerns that universal service could be harmed if we were to allow interexchange carriers (IXCs) to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges."[13] As a result, to the extent a CLEC wants to use the same transport facility to provide both local exchange and exchange access service, and does not otherwise satisfy the "safe harbor" provisions in the *Supplemental Order Clarification,*[14] it must order the exact same facilities that comprise the EEL from the Bell company's interstate special access tariff, at considerably higher rates.

The Commission declined to consider provisioning of special access circuits in a section 271 proceeding because special access circuits are not UNEs:

> Although dedicated local transport and the interoffice portion of special access are generally provided over the same facilities, they differ in certain other respects. A number of these parties, however, assert that the checklist requirements focus on the provision of physical facilities, not the regulatory classifications that apply. We do not believe that checklist compliance is intended to encompass the provision of tariffed interstate access services simply because these services use some of the same physical facilities as a checklist item.[15]

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[13] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) at ¶ 2.

[14] *Id.* at ¶ 22.

[15] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (1999), at ¶ 340.

The line between special access facilities and DS-1/DS-3 UNE facilities, however, is increasingly becoming irrelevant for regulatory purposes. This Commission has already recognized that "incumbent LECs routinely provide the functional equivalent of an EEL through their special access offerings."[16] Thus, it is an anomaly for the Commission to scrutinize a BOC's performance for facilities when they are classified in one category, but to not evaluate its performance for those same facilities when they are classified in another category. BellSouth has stated in proceedings in Georgia that the only difference between the two is price.

Moreover, the restrictions on the use of EELs that allow the Commission to distinguish between UNE combinations and special access circuits are not supported by the statute. Section 251(c)(3) requires the ILEC to make combined unbundled network elements available "to any requesting telecommunications carrier for the provision of a telecommunications service[.]"[17] The statute does not distinguish between using UNEs for local exchange service and using them for exchange access.

The restriction on the use of UNEs is grounded entirely in policy considerations—policy considerations that pre-date the first successful BOC application for 271 authority and are clearly out-of-date. As Commissioner Furchtgott-Roth said with some prescience two and a half years ago:

> The Commission is concerned that, without the restriction [on the use of EELs], the market for special access services will be undermined, because competitors will be able to offer combinations of network elements as a lower-priced substitute for incumbents' special access services. I believe that there are other ways that the Commission could have addressed this concern consistent with the statute. Since the problem stems from the Commission's rules for access charges, the obvious answer is a prompt revision of those rules, so that incumbent carriers

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16 *UNE Remand Order* at ¶ 481.

17 47 U.S.C. § 251(c)(3).

> are no longer required to include implicit subsidies in their prices for access services. . . What the Commission may not legally do, however, is impose restrictions on the ways in which requesting carriers may use the network elements that they purchase from incumbents.[18]

That was two and a half years ago, and prior to any BOC obtaining section 271 authority. Since then, Verizon has obtained 271 authority in eight states, SBC has obtained 271 authority in five states, and BellSouth has obtained 271 authority in two states. Applications for additional 271 authority are now pending for Verizon, BellSouth and Qwest for another 13 states. Yet the restrictions on the use of EELs have not changed. Meanwhile, the Commission has largely set in place reforms of the Commission's access charge and universal service regimes.[19]

Further, the restrictions on the use of UNE combinations deny US LEC and Starpower the use of an efficient network architecture because it significantly hinders their ability to achieve reasonable economies of scale when US LEC or Starpower cannot build facilities. The restrictions on UNEs essentially forces CLECs that want to use UNEs in conjunction with access services to instead build parallel and inefficient networks within the existing ILECs networks, to the detriment of the development of local competition.

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[18] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760 (1999), Dissenting Statement of Commissioner Harold Furchtgott-Roth.

[19] *Access Charge Reform; Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) ("CALLS Order"); *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2000) at ¶ 97 ("The CALLS plan established, for the period July 1, 2000 through June 30, 2005, interstate access rate levels and an aggregate amount of interstate universal service support for ILECs subject to price cap regulation. The Commission recently sought comment on an industry-sponsored access reform and universal service proposal for all other ILECs; this plan would, if adopted, be implemented over a five-year period.")

III. VERIZON'S PROVISIONING OF SPECIAL ACCESS FACILITIES IN VIRGINIA IMPAIRS COMPETITION

A. The Hearing Examiner at the Virginia SCC Found That Verizon's Provisioning of High-Capacity Loops Impairs Competition

Once the Commission decides to consider special access within its review of checklist compliance, it is clear that Verizon should not be granted section 271 authority. As the Virginia Commission has found, CLECs that purchase special access facilities from Verizon encounter substandard and discriminatory provisioning and maintenance that significantly impairs their ability to compete.

The Virginia Hearing Examiner noted a number of discriminatory practices in which Verizon engages.[20] First, Verizon often refuses to provide high-capacity loops on the grounds that there are "no facilities" available in the Verizon network. Verizon's claim for "no facilities" includes situations in which "all that Verizon Virginia must [do] to provide the requested service is open a cable sheath to splice existing pairs into an existing apparatus case," which Verizon will do routinely for its retail customers. Verizon's own witness acknowledged that between 10% and 30% of all orders for high-capacity loops are rejected for "no facilities," whereas in general, Verizon's retail customers are never denied service due to "no facilities."[21]

The Virginia Hearing Examiner also criticized the process in which CLECs ultimately obtain high-capacity loops, which appears to be condoned by this Commission. First, a CLEC submits an order for a high-capacity loop, and is informed by Verizon that the order is denied because of "no facilities." Second, the CLEC submits an order for the identical facilities, but this time through Verizon's interstate special access tariff, "at a significantly higher cost." Third, the

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[20] *Virginia SCC Report* at 111.

[21] *Id.* at 111-112.

CLEC converts the special access circuit to a UNE transport facility. Although the CLEC achieves what it wanted—a high-capacity UNE loop facility—the CLEC must go through the added delay and expense of the conversion process.[22]

The Virginia Hearing Examiner declined to consider Verizon's provisioning of special access circuits for checklist compliance, pursuant to Commission precedent, and found that Verizon satisfied the checklist item.[23] Nonetheless, the Virginia Hearing Examiner stated, "to fulfill our consulting role, the [Virginia] Commission should advise the FCC that Verizon Virginia's policy has a significant and adverse effect on competition in Virginia, is inconsistently applied across UNEs, is at odds with industry accounting rules, and is inconsistent with TELRIC-pricing principles."[24]

Therefore, Verizon's provisioning of special access circuits requires the Commission to reject Verizon's application in Virginia.

B. Verizon's Provisioning of Special Access Circuits Are Not Subject to Performance Standards Common to 271 Applications

Unless the Commission considers the discriminatory effects of Verizon's provisioning of special access services, Verizon will continue its practices with impunity. Currently, in order to monitor BOC compliance after receiving 271 authority, the Commission considers performance metrics related to checklist compliance. Currently, however, the Commission has no performance standards for the provisioning of special access circuits. While the Commission is currently examining whether to adopt special access performance standards. ILECs have argued

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[22] *Id.*

[23] *Id.* at 113.

[24] *Id.*

that this Commission has exclusive jurisdiction over mixed-use special access facilities and denies that state commissions have jurisdiction over such facilities.[25] Thus, these facilities fall into a regulatory "black hole" if a state finds it has no jurisdiction over mixed access facilities, and this Commission declines to set standards for special access provisioning. This unfortunate reality provides the Bell companies the opportunity to discriminate against CLECs with impunity as described by the Virginia Hearing Examiner.[26]

C. Provisioning of Special Access Facilities

US LEC monitors Verizon's provisioning of high capacity facilities in the actual delivery phases. US LEC has measured Verizon's ability to provide a firm order confirmation that matched US LEC's requested due date or customer desired due date. In January 2002, 51% of the FOCs did not meet the requested due date; in February 2002, 66% did not; in March 2002, 37% did not; in April 2002, 54% did not; and in May 2002, 64% of the FOCs did not meet the requested due date.

US LEC has also reviewed Verizon's ability to install in accordance with US LEC's requested due date. The facility acceptance date should be the day Verizon delivers the circuit to

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[25] *See, Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' provision of Special Access Service,* Docket No. 01-34 (Mass. DTE), AT&T Communications of New England, Inc.'s Response to Verizon's Comments at 2 (April 30, 2001) ("*AT&T Massachusetts Response*").

[26] The Commission's repeated suggestion that CLECs may file Section 208 Complaints for discriminatory provisioning of special access circuits is an inadequate method of addressing the problem. *See Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000) at ¶ 335 ("*SBC Texas 271Order*"); *Massachusetts 271 Order* at ¶ ¶ 211, 231. That arrangement puts the onus on CLECs to pursue expensive and time consuming litigation to compel BOCs to comply with federal law while the BOCs continue to operate in violation of applicable requirements. By considering special access circuit

US LEC. In January 2002, for 11% of the orders, the acceptance date did not match the requested due date; in February 2002, the requested due date did not match the acceptance date for 6% of the orders; and in March 2002, the percentage was 15%. The percentages of missed due dates for April and May 2002 were 19% and 16%, respectively. These performance results are clearly unacceptable.

Moreover, what cannot be found in any data submitted by Verizon is the number of customers that stay with Verizon and cancel their order with the CLEC as a result of these delays caused by Verizon. If the customer decides to cancel its order with the CLEC, its only near-term option is to stay with the monopoly provider.

D. Maintenance of High Capacity Facilities

US LEC has also experienced severe problems with Verizon's maintenance and repair of high capacity facilities. In US LEC's experience, when a customer reports an outage, it contacts US LEC. US LEC opens an internal trouble ticket and investigates the problem. When the trouble is isolated to Verizon's network, US LEC opens a trouble ticket with Verizon. From January 2002 to May 2002, US LEC experienced 168 outages on these circuits in Virginia that US LEC determined were due to problems on Verizon's network. Further, US LEC's data shows that for the outages from January 2002 to May 2002, the mean time to repair in Virginia was 4.3 hours. Outages of this frequency and duration imperil competition for customers who need high-capacity facilities. Since these facilities are used for vital business services, any

provisioning in section 271 proceedings, and by attaching applicable performance metrics, the onus is shifted to the Bell companies to demonstrate compliance rather than requiring the CLECs to prove non-compliance.

protracted outage negatively impacts the CLEC's ability to keep the customer or obtain new ones, as well as the CLEC's reputation and brand.

Many of the outages appear to be due to gross human error on the part of Verizon. Verizon technicians often work orders earlier than they are supposed to, they pull cable pairs in error, and they reassign circuits without testing them to see if the circuit is in use. When these errors are raised with Verizon, Verizon always admits responsibility and always explains that the employee has been disciplined or counseled. Outages due to human error can be prevented through better training and supervision. The fact that the outages have not been abated demonstrates Verizon's disregard for service quality.

These outages are putting CLEC customers out of service for days and give customers the undeserved impression that CLECs cannot provide quality service. Customers do not care if Verizon is the cause of the problem; the customer has purchased reliable service and quick restoration of service when problems occur.

IV. VERIZON'S ATTEMPTS TO LIMIT ACCESS TO DEDICATED TRANSPORT BY CHARGING ACCESS RATES FOR DEDICATED TRANSPORT, BY REQUIRING COLLOCATION BEFORE DEDICATED TRANSPORT CAN BE PURCHASED AT UNE RATES, AND BY ASSESSING ANY IMPROPER ENTRANCE FACILITY RATES MUST BE TERMINATED BEFORE SECTION 271 AUTHORITY IS CONSIDERED

Starpower is concerned about two issues related to Verizon's provision of unbundled dedicated transport that must be resolved before the Application could be granted. First, Verizon has taken EEL restrictions one step further by requiring collocation before dedicated transport can be purchased as a UNE, in violation of Checklist Items 2 and 5. Second, Verizon's rate structure for entrance facilities charges should be examined to ensure that it does not hinder

CLECs from obtaining access to dedicated transport in violation of Checklist Items 2 and 5 by including the assessment of unwarranted charges.

A. Dedicated Transport Must Be Made Available at UNE Rates, and Without a Collocation Requirement

Although the Act and the Commission's rules entitle CLECs to purchase cost-based facilities for interconnection purposes, Verizon resists selling UNE Dedicated Transport to CLECs for interconnection trunks. For example, in several states Verizon refuses to provide Starpower or its affiliate RCN Telecom Services with cost-based interconnection facilities, requiring them to order such facilities from Verizon's interstate special access tariff. Thus, Verizon seeks to require CLECs to purchase interconnection facilities at higher rates that do not comply with the cost-based pricing requirements of Section 252(d)(1) and Commission rules. As RCN and others have shown in comments filed previously in CC Docket 96-98 and as explained in comments filed in the Commission's *Triennial Review Proceeding*, purchasing special access instead of cost-based transport could increase a competitors' costs by a factor ranging to over seven, depending on the market at issue.[27] Thus, by requiring a CLEC to purchase special access instead of cost-based UNE dedicated transport for interconnection facilities, an ILEC such as Verizon can create a substantial cost disadvantage for its competitors and discriminate in favor of its own operations.

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[27] *See, e.g.*, RCN Comments in CC Docket No. 96-98, Declaration of Joseph Kahl, T 18 (filed June 11, 2001) (special access could increase costs by factor of 5); WorldCom Comments in CC Docket No. 96-98, Exhibit G (filed June 11, 2001) (special access could increase costs by up to 397%); AES Communications Comments in CC Docket No. 96-98, Exhibit 1 (filed June 11, 2001) (special access could increase costs by over 700%). *See also* RCN Telecom Services, Inc., *et al*, CC Docket 01-338, 96-98, and 98-147 (filed April 5, 2002) at 67-70).

Verizon's practices were recently rejected in the *Virginia Arbitration Order*, where the Commission adopted AT&T's proposal to incorporate language in the parties' interconnection agreement stating that it may purchase UNE dedicated transport at UNE rates.[28] The Commission emphasized that "Verizon has no basis for requiring AT&T to order dedicated transport from its access tariffs" in lieu of providing it at UNE rates.[29] In order to preclude this form of price discrimination and prior to favorably considering Verizon's request for Section 271 authority in Virginia, the Commission should clarify that Verizon may not refuse to provide CLECs with cost-based UNE dedicated transport and use it for interconnection trunking.

In addition, the Commission must preclude any Verizon requirement that a CLEC must collocate in every Verizon central office to be able to obtain TELRIC prices for dedicated transport facilities. There are many central offices where the traffic volume may not warrant the cost of collocation. The Commission has noted that "collocating in each end office imposes materially greater costs on requesting carriers than would the purchase of the incumbent's interoffice transport facilities."[30] The Commission noted that a CLEC will face non-recurring charges that range from $15,000 to $508,000 to provision physical collocation arrangements in a central office.[31] This would be on top of the equipment that the CLEC would have to deploy in the arrangement such as fiber distribution panels, optical terminating equipment, multiplexers, digital cross connects, test access equipment, digital loop carrier equipment, power distribution panels, and cable racks.[32] Requiring CLECs to collocate in every central office to get TELRIC

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28 *Virginia Arbitration Order* at ¶ 215.

29 *Id.* at ¶ 217.

30 *UNE Remand Order* at ¶ 357.

31 *Id.*

32 *Id.* at ¶¶ 356-357, n. 702.

prices for dedicated transport would eviscerate the benefits of unbundling dedicated transport. Verizon should be precluded from imposing unnecessary and unwarranted requirements that would impede such CLEC access. Some speedy and cost effective remedy other than time-consuming litigation must be available.

This issue was squarely addressed in the *Virginia Arbitration Order*, where the Commission rejected Verizon's position that AT&T was not entitled to purchase interoffice transmission facilities at UNE rates unless those facilities terminated in an AT&T collocation arrangement. The Commission found that "There is no requirement that a competitive LEC collocate at the incumbent LEC's wire center or other facility in order to purchase UNE dedicated transport, and Verizon offers no support for its contrary position."[33] In light of this ruling and for the reasons stated herein, the Commission should prohibit Verizon from imposing any collocation requirement on the purchase of dedicated transport at UNE rates as a condition of any favorable action on the Application.

B. Any Verizon Attempt to Increase Dedicated Transport Costs by Charging Unwarranted Entrance Facility Rates Must be Rejected

To the extent that Verizon is charging any entrance facilities rate element that unjustifiably increases UNE rates in Virginia, it should be prohibited from doing so prior to the award of Section 271 authority. As RCN's Triennial Review Comments explained, Verizon's New York affiliate recently added a new entrance facilities rate element for dedicated transport that it has not previously included in the UNE rates charged to CLECs, and which was not the subject of any substantive review by the New York Public Service Commission to determine the

[33] *Virginia Arbitration Order* at ¶ 217.

propriety of the rate. Instead, Verizon New York filed a compliance tariff on February 19, 2002, following the conclusion of Commission UNE rate Case 98-C-1357, which included a new entrance facilities rate element in addition to the fixed and per mile monthly charges that had previously comprised the dedicated transport rate.[34]

Starpower is concerned that Verizon Virginia's rate structure may similarly include unwarranted entrance facilities charges. Although entrance facilities were deemed a separate rate element by the SCC when setting Verizon's UNE rates several years ago, the SCC specified that it was making such a designation to be consistent with Verizon's (then Bell Atlantic's) cost studies.[35] It is not apparent that any substantive analysis of the propriety of an entrance facilities rate element was undertaken by the SCC. The inclusion of such charges may significantly increase the cost of dedicated transport and could thus impair CLECs' ability to obtain the UNEs necessary to provide their intended services. Accordingly, the Commission in this proceeding should not allow Verizon to impose this rate structure for interoffice transport absent a determination that any charges are warranted.

V. VERIZON FAILS TO PROVIDE ADEQUATE NUMBER PORTABILITY IN VIOLATION OF CHECKLIST ITEM 11

Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with number portability requirements of section 251 as implemented by the Commission. Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with

[34] The new rate element, which actually consists of two components, a fixed monthly charge and a per ¼ mile monthly charge, would effectively double the rates previously charged to CLECs.

[35] *See* Order, *Ex Parte: To Determine Prices Bell Atlantic-Virginia, Inc., is Authorized to Charge Competitive Local Exchange Carriers in Accordance with the Telecommunications Act of 1996 and Applicable State Law*, Case No. PUC970005 (Va. SCC May 22, 1998) at 14.

requirements prescribed by the Commission."[36] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[37]

Verizon seems incapable of handling changes to a cut-over request. Sometimes a US LEC customer needs to reschedule its transition to US LEC. For example, the customer may need to postpone installation of customer premises equipment, or accommodate the schedules of vendors or technicians. US LEC then provides Verizon with timely notification of the change. Verizon, however, routinely fails to suspend the porting request and disconnects the line from Verizon facilities. The result is a complete loss of service to the customer, which could have been avoided by better cooperation from Verizon. Starpower has experienced similar problems due to Verizon's failure to change the porting request.

VI. VERIZON'S APPLICATION IS NOT IN THE PUBLIC INTEREST

A. The Standard

Under Section 271(d)(3)(C) of the Act, the Commission may not grant Section 271 authorization unless it is consistent with the "public interest, convenience and necessity."[38] This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.[39] The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating section 271

[36] *SBC Texas 271Order* at ¶ 369.

[37] *Id.*

[38] 47 U.S.C. § 271(d)(3)(C).

[39] *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[40] As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."[41] The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."[42]

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[43] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[44] The Commission explicitly recognized that "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[45]

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[40] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("*Ameritech Michigan 271 Order*").

[41] *Id.* at n. 992, *quoting,* S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

[42] *Id.*

[43] *Ameritech Michigan 271 Order* at ¶ 383.

[44] *Id.* at ¶ 385.

[45] *Id.*

Predictably, the BOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.[46] BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.[47] The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."[48] The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[49] As the Department of Justice notes, in-region interLATA entry by a BOC should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[50]

Senators Burns, Hollings, Inouye, and Stevens reaffirmed the importance of the public interest standard in a letter to Chairman Powell.[51] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that

[46] *Second Louisiana Order,* at ¶ 361.

[47] *Id.*

[48] *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

[49] *Ameritech Michigan 271 Order* at ¶ 386.

[50] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[51] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001).

> authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[52]

The Commission has traditionally focused on both the current state of competition in a particular market and assurances of future compliance to ensure future competition in evaluating the public interest standard.[53]

More recently, however, the Commission has weakened the public interest standard and has adopted positions consistent with the BOC attempts to subsume the public interest analysis under considerations of checklist compliance. In the *Georgia/Louisiana 271 Order*, the Commission virtually tied approval to checklist compliance: "[A]lthough the Commission must make a separate determination that approval of a section 271 application is 'consistent with the public interest, convenience, and necessity,' it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B)."[54]

Further, the Commission has given applicants substantial latitude in demonstrating such checklist compliance. The Commission has allowed applicants to incorporate interconnection terms and conditions,[55] rates,[56] and even performance data[57] from another state to demonstrate checklist compliance in a particular state. The Commission has also increasingly allowed

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[52] *Id.* at 3.

[53] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, (Jan. 22, 2001) ¶¶ 266-281 ("*SWBT Kansas/Oklahoma 271 Order*").

[54] *Georgia/Louisiana 271 Order* at ¶ 280.

[55] *SWBT Kansas/Oklahoma 271 Order* at ¶ 35.

[56] *See id.* at ¶ 82, n. 244.

[57] *See id.* at ¶¶ 35-38.

applicants to rely on promises of future compliance.[58] As a result, the checklist has increasingly become a formula where if the applicant can plug in the correct inputs it can obtain Section 271 authority.

The Commission has determined that this latitude is warranted. US LEC is not here to second-guess that determination, but to merely reiterate that this is all the more reason for a viable public interest standard. With the mounting number of metrics to consider, it is inevitable that the process will only continue to grow more mechanistic. As checklist compliance becomes all the more mechanistic, it is all the more important that a viable public interest standard be preserved.

The public interest standard will enable the Commission to look beyond the numbers and look at the qualitative aspects of the application. The Commission will be able to consider if the application, when looked at as a whole, truly promotes competition and is in the public interest.

Promoting CLEC market entry should be a paramount goal of the Commission. Competitive entry into local markets promotes increased choices for end users and promotes innovation and demand for services. For instance, CLECs have fueled the growth of advanced services and broadband deployment by deploying state-of-the-art networks. Prior to competitive entry, the BOCs were disinterested in advanced services and broadband deployment;[59] now they fill airwaves advocating greater broadband deployment. The Act was intended to provide for a

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[58] *See, Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Dissenting Opinion of Commissioner Michael J. Copps at 8 (September 19, 2001).

[59] In a White Paper released in September 2001, the Deputy General Counsel of Verizon explained how Verizon resists deploying state-of-the-art facilities in a competitive market before Verizon has recouped its investment in its more traditional facilities. John Thorne, "The 1996 Telecom Act: What Went Wrong and Protecting the Broadband Buildout" (Sep. 2001) at 13-14. Carriers entering the market for the first time would be much more likely to deploy facilities using the most recent technological advances throughout their network.

"pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[60] The goal of promoting competition was to "secure lower prices and higher quality services for American telecommunications consumers."[61] As the House Commerce Committee Report noted:

> Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.[62]

Competitive entry into markets has helped make the goals a reality, and the Commission has played a significant role in effecting these goals. The Commission, however, cannot ignore those goals now.

The Commission cannot deny that local competition is imperiled and that competitive exit from local markets is not in the public interest. For this reason, the Commission should reconsider this misguided statement from the *Georgia/Louisiana 271 Order*:

> Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the financial hardships of the competitive LEC community do not undermine that showing. We have consistently declined to use factors beyond the control of the BOC, such as the weak economy, or over-investment and poor business planning by competitive LECs to deny an application.[63]

This statement indicates an almost complete abandonment of any public interest standard. Checklist compliance is a requirement, but it is not the only requirement for section 271 approval. The Commission must consider BOC applications within the context of the current

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60 P.L. 104-104, Telecommunications Act of 1996, S. Conf. Rep. 104-230 at 1 (1996).

61 P.L. 104-104, H.R. Rep. 104-204(I) at 160 (1995).

62 *Id.*

63 *Georgia/Louisiana 271 Order* at ¶ 282.

telecommunications industry. The CLECs that remain in business provide the only hope for intramodal competition in local markets as BOCs have been refusing to compete in each other's regions. With the long distance industry in turmoil, and the increasing possibility that now two of the large three long distance carriers, particularly WorldCom and perhaps even AT&T, will be purchased by a BOC, the vision for the 21st century is fast becoming a return to the pre-1980s America.

The 1996 Act was designed to provide end users with a number of competitive choices and services. As Commissioner Copps has stated:

> The combination of competitive BOC entry into the interLATA market and competitive local exchange carrier (CLEC) entry into the BOC's once-dominant local market, Congress believed, would lead to significant consumer benefits in the form of lower prices, better service, and investment in new technologies. Continued BOC dominance of a state's local market, however, could undermine consumer benefits if the BOC could leverage this dominance upon entering the interLATA market.[64]

If the Commission allows the Section 271 process to continue to be diluted, end users will be seeing a landscape dominated by the BOCs each seeking to maintain their monopolies in their regions. The Commission was given the ability to prevent such a scenario through use of the public interest standard. The Commission should employ this standard to ensure that local markets are irreversibly open to competition. The steady erosion of the separation between checklist compliance and satisfaction of the public interest standard must be reversed. Given the state of the competitive telecom industry, and the BOC efforts to thwart the local competition provisions of the Telecom Act, granting Verizon Section 271 authority in Virginia is clearly not in the public interest, and Verizon's Application should be denied.

B. The Danger of Premature Entry

The Commission should also be vigilant to ensure against the danger of a premature grant of Section 271 authority. If a BOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.[65] As Dr. Mark N. Cooper of the Consumer Federation of America noted:

> [t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or 'competitive imbalance,' in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.[66]

As the Commission has also noted:

> Section 271, however embodies a Congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.[67]

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64 *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Dissenting Opinion of Commissioner Michael J. Copps at 1 (September 19, 2001).

65 *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service,* California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001).

66 *Id.*

67 *Ameritech Michigan 271 Order* at ¶ 388.

> While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market is open to competition after BOC entry.[68]

Verizon's poor provisioning of facilities, as documented in these Comments, will only serve to preclude the development of viable competition in Virginia. CLECs will need to rely on provisioning of facilities from Verizon until they can deploy their own facilities. CLECs' use of their own facilities should increase over time as CLECs build out their own networks. There will always be reliance upon Verizon for some portion of the circuit, typically the last mile to the customer's premise. The purchase of unbundled network elements will serve as a bridge that will provide CLECs "with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[69] As Justice Breyer noted in *Iowa Utilities Board*:

> [o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition . . . .[70]

Verizon's practices impede this "sharing" of the basic facilities necessary to provide competitive telecommunications service.

As the FCC has noted, requiring CLECs to self-provision facilities such as loops would "materially raise entry costs, delay broad-based entry, and limit the scope and quality of a competitor's offerings," and is "not an adequate alternative for loops that a carrier can obtain

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68 *Id.* at ¶ 390.

69 *UNE Remand Order* at ¶¶ 52.

70 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 416-417 (Breyer, J., concurring in part/dissenting in part).

from an incumbent LEC."[71] Verizon's poor provisioning of these facilities delays the expansion of CLEC business, which delays the rollout of their own facilities and in turn thwarts facilities-based competition.

VII. CONCLUSION

For the foregoing reasons, US LEC Corp. and Starpower Communications, LLC urge the Commission to deny Verizon's Application for Provision of In-Region InterLATA Services in Virginia.

Respectfully submitted,

Michael W. Fleming

Richard M. Rindler
Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7645 (Facsimile)

Counsel for US LEC Corp. and Starpower Communications, LLC

Wanda Montano
Vice President, Regulatory Affairs
US LEC Corp.
6801 Morrison Boulevard
Charlotte, North Carolina 28211

Deborah Royster
General Counsel
Starpower Communications, LLC
10000 Derekwood Lane
Lanham, MD 20706

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[71] *UNE Remand Order* at ¶ 181.